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No. 06-5247

In The Supreme Court of the United States

JOHN F. FRY,

Petitioner,

v.

CHERYL K. PLILER, Warden,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Is application of the harmless-error standard for federal habeas corpus cases enunciated in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), limited to cases where the state court recognized federal constitutional error and subjected it to review for harmlessness under *Chapman* v. *California*, 386 U.S. 18 (1967)?

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STATEMENT OF THE CASE

A. The State Trial

After two California juries had deadlocked, a third jury in 1995 convicted petitioner Fry of the first-degree murders of Cynthia and James Bell at a trial in which a citizen fortuitously came forward with petitioner's gun, and scientific evidence showed it to be the murder weapon. J.A. 44, 67-68.

1. Prosecution Case

a. In the third trial, the prosecution produced evidence that, shortly before 7 a.m. on October 27, 1992, the Bells were discovered shot dead inside a Chevrolet Camaro automobile parked alongside Interstate 505 in Solano County, California. Reporter's Transcript ("R.") 578-83. The time of death was six to twelve hours earlier. R. 1499, 1518, 1526. Witnesses reported a truck similar to petitioner's parked next to the Camaro the previous evening. R. 846, 855, 872, 1223.

Petitioner, a methamphetamine user and dealer, had employed Cynthia Bell as one of his dealers. Less than a week before, petitioner caught Cynthia in his house without permission and became convinced she planned to steal drugs or money from him. R. 1367-68, 1947-52. Several witnesses testified petitioner threatened to kill Cynthia in the days before her death. R. 1256, 1381, 1955.

Petitioner also was behaving erratically. On October 24, he drove Arleen Murphy to a deserted levee road where he accused her of plotting to steal from him. R. 1202-03. He said it was time for Murphy to "go to sleep," and he fired his .357 out the truck window. R. 1203-06. On the

morning of the murders, petitioner kicked in the door of Murphy's boyfriend's apartment. R. 1234-36.

After the murders, petitioner returned home in a bloody, disheveled state. He told his brother, his friend and a roommate that he had killed the Bells. R. 1682-83, 1965-66, 2101. Petitioner's .357 revolver held four spent shells and had blood on it. R. 1690, 1693, 2112, 2118. Petitioner said "you couldn't imagine" what a .357 would do to "somebody's skull." R. 2120. Petitioner cleaned up, then left to make a drug transaction.

Later, petitioner told his brother that he had ditched the gun at a nearby gas station, and that a man named "Mike" picked up the gun for him. R. 2287. The day after the murders, petitioner removed the camper shell from his truck to alter its appearance. R. 1698-99. When police attempted to arrest him, petitioner fled, leading them on a high-speed pursuit. R. 2327, 2334-35.

b. Petitioner had registered a Ruger Security Six .357 magnum pistol in May 1991. R. 2315. An empty "Ruger pistol box" was found in petitioner's house, but at first the gun itself was not located. R. 1561-63. According to a firearms expert, bullets recovered from the bodies and the crime scene could have been fired from a Ruger .38 Special or .357. R. 2366, 2370.

After the prosecution rested its case, Robert Gridley, a citizen who had learned from press accounts of the trial that the murder weapon was missing, came forward with petitioner's .357. R. 2402-03. After the prosecution reopened its case-in-chief, Gridley testified that in May 1993 he had found the gun hidden in the metal channel of a doorframe in unit 5141-C of an industrial building in Vacaville, California. R. 2431-33.

Michael Walker, who worked for the same transportation company as petitioner, had rented unit 5141-C from summer until about Christmas in 1992. R. 2476-78, 2483. Walker sublet to Mike Turner, who agreed to pay half the rent and had a key to the unit. R. 2480. About a month before the murders, petitioner and his girlfriend had visited unit 5141-C. R. 2483. Two days after the murders, police serving a search warrant at petitioner's house observed Mike Turner across the street. R. 2464-65.

The gun found by Gridley was unloaded and in a case, but the speed loader with the gun contained two .38-caliber bullets and four .357-caliber bullets. R. 2438. Petitioner's brother Edgar identified the gun found by Gridley as the firearm from which Edgar had cleaned blood on the night of the murders. R. 2470-71. Edgar testified that the gun case found by Gridley was similar in size and shape to petitioner's gun case. R. 2470.

The .357 revolver, moreover, bore the serial number of a gun registered by petitioner in 1991. R. 2456. A ballistics expert testified that one bullet found at the crime scene had been fired by that gun. R. 2461. At least two other bullets recovered from the scene could have been fired by petitioner's gun, but there was insufficient individual detail on those bullets for a definite match. R. 2462.

c. In addition, the prosecution produced evidence from five witnesses that petitioner had admitted killing the Bells. On the night of the crime, petitioner confessed the murders to his brother Edgar, R. 2101, 2120; to his friend Debbie Mathies, R. 1965-66; and to his housemate Shannon Nissen, R. 1688-89, 1695. The next morning, while petitioner and Nissen removed the camper shell so people would not "recognize the truck," petitioner told

Nissen that he had shot Cynthia Bell "and her boyfriend." R. 1699-1700. A day or two before his arrest for the murders, petitioner told a former co-worker, Douglas Carter, that he had "killed the people in Vacaville" because they had been "harassing him and his kids." R. 2500.

The fifth person to whom petitioner admitted the killings was Robert Jacobitz. They met while petitioner was in custody awaiting the third trial and Jacobitz was incarcerated on domestic violence charges. Jacobitz claimed membership in the Aryan Brotherhood prison gang to bring himself respect from other inmates. R. 955. Petitioner told Jacobitz that he had caught Cynthia Bell breaking into his house and that she owed him money, and that he therefore had arranged to meet her and James Bell in a secluded area in Vacaville and kill them. R. 974. Petitioner told Jacobitz he kissed Cynthia on the cheek, said something to her, and then shot her in the head. R. 979-80. Petitioner reported that it "blew her head off," and that a piece of her skull was found 35 feet away. R. 981. He said that he then reached across her, saying "I'm sorry James. You're in the wrong place at the wrong time," and shot James three times. R. 980-81. Petitioner said that he used a .357 caliber gun to do the killings, and that he had blood on his shirt, pants and shoes. R. 980, 983. Petitioner also said that his girlfriend's "best friend," a "black male," now had the murder weapon. R. 988.[1]

Petitioner further told Jacobitz that his brother was the "star witness in the case against him." R. 964. Petitioner explained that he really needed his brother to

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[1] Mike Turner meets this description. R. 2734, People's Exhibits 110, 111.

change his testimony "to offset the other witnesses." R. 966. He warned that his brother could not be killed, as the prosecution could simply use his testimony from the prior trials. Jacobitz told petitioner that people could call on his brother and take steps like cutting off his finger to "let him know they're serious" about changing his story. R. 970. Petitioner later supplied Jacobitz with a piece of paper with his brother's name and address. R. 994-95, Exhibit 102.[2]

2. Defense Case

In his defense, petitioner testified that he was at home when the Bells were killed. The defense identified three men who had threatened the Bells or had confessed to the murders: Darryl Borelli, Ryan Bernal, and Anthony Hurtz. Two witnesses said that Borelli was a drug dealer and that he was angry with and threatening towards Cynthia Bell. R. 4302-03, 4420. Two witnesses said that Bernal had admitted participating in the killings. R. 4122, 4822-24. Seven witnesses said that Hurtz had confessed to committing the murders, or had admitted to being involved in planning their murders. R. 3999, 4069, 4156-58, 4247-49, 4439-40, 4484-85, 4755-60.

The defense offered an eighth witness, Hurtz's cousin Pamela Maples. She testified that, in April 1994, she was at her sister's condominium in Vallejo when she overheard Hurtz discussing some homicides. J.A. 7-8. After the prosecutor objected on lack-of-foundation grounds, J.A. 8, the judge heard Maples testify further outside the

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[2] Petitioner admitted writing his brother's address on a sheet of paper and giving it to Jacobitz, but denied asking Jacobitz to do anything to his brother. R. 3743-44.

presence of the jury. Maples continued, stating that she had been "in and out" of the room and heard "bits and pieces" of a conversation that was already underway when she came in. J.A. 9-10. She did not know how long the others had been discussing the murders, the context of the discussion, or if it was even a serious discussion. J.A. 10-11. According to Maples, Hurtz said that he had shot a man and a woman in a car: that he shot the "girl" first, in the head, and "[t]hen he reached over and shot the guy." J.A. 12. In Maples's account, Hurtz said that this had occurred in a "parking place," that he was "full of blood" after the killings, and that he ran through a field and threw mud on himself and then called someone to pick him up. J.A. 12. Hurtz said nothing about when or where this took place. J.A. 13.

The trial court sustained the prosecution's objection to Maples's testimony, finding that "there's not been a sufficient showing that this testimony ties in with the facts of our case." J.A. 17.

B. The State Appeal

The California Court of Appeal affirmed the judgment. J.A. 25. The court rejected petitioner's claim that the exclusion of Maples's testimony had denied him his rights to present a defense and to a fair trial. J.A. 94. Applying California Evidence Code § 352, it found that, "[e]ven if her testimony was fully credited, there was simply insufficient evidence to connect the murders she heard Hurtz describe, with the ones at issue here." J.A. 96-97. The court reasoned that Maples "did not know when or where the killings occurred, or even if Hurtz was seriously describing an act he had himself committed. There was no mention of Cynthia or James Bell, and indeed no

identification of the alleged victims' [sic] of Hurtz's murders at all." J.A. 97. Without specifying a standard of review, the state appellate court also found "no possible prejudice" from the exclusion of Maples's testimony, because "very similar testimony" reporting Hurtz's confessions by at least two other defense witnesses, Harmina Ross and Eliane West, made Maples's "testimony to similar effect . . . merely cumulative." J.A. 97 n.17.[3]

The California Supreme Court denied review. J.A. 113.

C. Federal Proceedings

1. In 2001, petitioner filed a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Eastern District of California. The district court adopted the magistrate judge's findings and recommendation to deny the petition. J.A. 209. The court ruled, first, that Maples's proffered testimony was "sufficiently 'crucial or reliable' to outweigh the state's interest in exclusion of untrustworthy evidence." J.A. 180. And, acknowledging the applicability of the Antiterrorism

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[3] Although the court did not specify a standard of review, California law applies the test of *People* v. *Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243 (1956), where a defendant must show a reasonable probability of a more favorable result in the absence of the error, to exclusion of third party culpability evidence under California Evidence Code § 352. *People* v. *Cudjo*, 6 Cal. 4th 585, 611-12, 863 P.2d 635, 650-51, 25 Cal. Rptr.2d 390, 405-06 (1993). Petitioner conceded as much in his appellate brief in the state court of appeal. Appellant's Opening Brief at 106. Because the state court appeared to be resolving the issue on § 352 grounds, and in view of petitioner's concession that *Watson* was the controlling standard, respondent did not contend in the Ninth Circuit that the state court finding of "no possible prejudice" was an analysis pursuant to *Chapman*. Appellee's Brief at 24. Under circumstances other than those presented here, however, a finding of "no possible prejudice" in a state court may well indicate an application of *Chapman* review.

and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (AEDPA) to the case, J.A. 117, the court further determined under 28 U.S.C. § 2254(d) that the state appellate court's failure "to recognize the trial court's error was an unreasonable application of clearly established law as set forth by the Supreme Court," J.A. 180 (citing *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), and *Washington* v. *Texas*, 388 U.S. 14 (1967)).

But the district court concluded that the state court's error was harmless under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993):

> Respondent is correct that petitioner presented a number of defense witnesses attesting to Hurtz's and Borelli's culpability. The same corroborative value attributable to Maples' testimony that is a part of the constitutional error analysis in petitioner's favor, nevertheless cuts against petitioner when determining whether the exclusion of Maples' testimony was harmful. The defense witnesses' implicating Hurtz, who were heard by the jury, were more exact and precise in their testimony and alleged far more damning detail, notwithstanding any bias and/or impeachment the prosecution was able to show. Thus, the jury did hear a good bit of evidence regarding Hurtz' alleged involvement. Moreover, respondent is correct that she could not have emerged completely unscathed by a cross-examination that would have pointed up the infirmities of her putative testimony, as noted above. While this court cannot conclude, as did the state appellate court that "no possible prejudice" could have ensued as result of the exclusion of the testimony, the court does find that there has been an insufficient showing that

> the improper exclusion of the testimony of Ms. Maples had a substantial and injurious effect on the jury's verdict. Habeas relief should be denied for this claim.

J.A. 181-82.

2. On appeal, the Court of Appeals for the Ninth Circuit affirmed in an unpublished opinion. It deemed the exclusion of Maples's testimony an "unreasonable" application of Supreme Court law, finding the evidence "sufficiently reliable" and "material." J.A. 212. The appellate court concluded, however, that "the exclusion of Maples' testimony was harmless because it did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" J.A. 212 (citing *Brecht* v. *Abrahamson*, 507 U.S. at 637).

The panel rejected petitioner's contention that *Brecht* should not apply when "the state appellate court failed to conduct a meaningful prejudice review." Invoking the Ninth Circuit precedents of *Bains* v. *Cambra*, 204 F.3d 964, 976 (9th Cir. 2000), and *Inthavong* v. *LaMarque*, 420 F.3d 1055, 1059 (9th Cir. 2005), the panel held that "the *Brecht* standard applies uniformly in all Federal habeas corpus cases under § 2254, regardless of the error standard, if any, applied by the state court." J.A. 212-13 n.3.

Judge Rawlinson dissented, but also applied *Brecht*. J.A. 213. She characterized Maples as "the only unbiased witness presented by either side" and opined that Maples's testimony would have had "a powerful impact" on the jurors. J.A. 213-14.

SUMMARY OF ARGUMENT

As this Court has recognized, the *Brecht* v. *Abrahamson* harmless error standard reflects appropriate deference to the important state interests implicated in habeas corpus review of final state judgments. It therefore applies in every habeas case raising a harmless error question, regardless of whether the state court first undertook a harmless error inquiry. Imposition of any more exacting standard, such as that of *Chapman* v. *California*, is unwarranted and would upset the state-federal habeas balance recognized by this Court in *Brecht* and confirmed by Congress in AEDPA. Proper application of the *Brecht* rule in this case vindicates the conclusion of almost every judge who has considered the question: the claimed error was harmless.

1. This Court has long declared that habeas corpus review of state criminal convictions is not a mere extension of direct review. It does not serve as a second appeal. Habeas review is separate and collateral, both in form and function. Relief is not available merely upon an ordinary showing of error and prejudice. These limits on habeas corpus are founded in important policy judgments about federalism, comity, finality of criminal convictions, and the primacy of the trial as a truthfinding mechanism.

Those same judgments led this Court to declare, in *Brecht*, that final criminal convictions would not be overturned on federal habeas corpus simply because the state could not show that a constitutional violation was harmless "beyond a reasonable doubt" under the appellate standard of *Chapman*. A more-forgiving standard—whether the error actually exerted a substantial and injurious effect

on the verdict—was adopted as appropriate to collateral review.

The stated rationale of *Brecht* makes it clear that adoption of a forgiving standard, rather than the exacting *Chapman* standard, is a function of federal-state relations and the nature of habeas corpus—and that it does not logically depend upon the happenstance of whether the state court conducted any harmless-error inquiry first. The reasons cited in *Brecht*—finality of state convictions, concerns about comity and federalism, and a desire to accord trials proper respect—have nothing to do with a state court's prior ruling or application of *Chapman*. Petitioner's argument—that use of a relaxed harmless-error standard now should be relegated to the odd case where a state court previously subjected a claimed error to scrutiny under the strict rule of *Chapman*—ignores the important policies that this Court recognized in *Brecht*.

Besides being contrary to the policies enunciated in *Brecht*, it would be counterproductive to accept petitioner's attempt to hinge the federal courts' use of *Chapman*'s stringent standard for harmless-error review upon the state court's articulation of its prejudice analysis. Petitioner's reading likely would give rise to a host of interpretive issues about the standard of harmless-error review employed by the state court to particular issues, as well as to claims by habeas applicants that the state court had engaged in bad-faith applications of *Chapman* merely to avoid a stricter standard of federal habeas review.

Petitioner's argument would unacceptably alter the balance between the state and federal courts and between direct and collateral review. The *Brecht* standard should

be applied to *all* constitutional trial errors brought to federal court on collateral habeas review.

2. The Ninth Circuit and the district court correctly determined that the exclusion of Maples's testimony was harmless under the *Brecht* standard. The case against petitioner was strong, with multiple witnesses testifying to his bloody state following the murders and his immediate, graphic confessions to them. The production of petitioner's gun at the third trial, together with ballistics evidence establishing that the gun was the murder weapon, added a vital element of proof of petitioner's guilt that had been unavailable to the jurors at his earlier trials.

It is unlikely that exclusion of Maples's proffered testimony affected the result. In her out-of-court testimony, Maples never asserted that Hurtz had confessed to killing the Bells. The homicides he mentioned were not linked by time, location, or the victims' identities to the Bell murders at issue here. Moreover, Maples could not say with certainty that Hurtz was "serious" when he spoke. Maples's inability to recount more than pieces of the conversation she overheard, let alone to testify that Hurtz actually confessed to these killings, diminished dramatically the value of her testimony.

To the extent the defense sought to prove that Hurtz had inculpated himself in the Bell killings, it had the benefit of seven witnesses who testified to that effect. Even so, petitioner's defense never focused, as petitioner suggests here, on a theory that Hurtz was the "actual killer" of the Bells. Rather, petitioner presented a third-party culpability defense offering three potential killers, not one. Petitioner's shotgun-style defense blunted the effectiveness of all the third-party culpability evidence,

and reduced further any relevance of Maples's testimony about Hurtz.

ARGUMENT

I.

THE *BRECHT* STANDARD APPLIES IN DETERMINING HARMLESS ERROR IN 28 U.S.C. § 2254 CASES

In *Brecht* v. *Abrahamson*, 507 U.S. 619, 638 (1993), this Court held that federal habeas corpus relief is unavailable for constitutional error of the trial type unless the error had a substantial and injurious effect or influence in determining the jury's verdict. The Court thereby adopted for habeas cases the more forgiving standard for nonconstitutional errors of *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946); and it limited to direct appeals the stricter standard of *Chapman* v. *California*, 386 U.S. 18, 24 (1967), which requires the State to show beyond a reasonable doubt that the error did not contribute to the verdict.

The Court took pains in *Brecht* to explain the concerns of finality, comity, and federalism that justified its decision. 507 U.S. at 634-36. In particular, the Court observed that "[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Id.* at 637.

Because the *Brecht* harmless-error standard reflects appropriate deference to the important state interests

implicated in habeas corpus review of final state judgments, it properly may be applied in every habeas case requiring a harmless-error analysis. Its application does not depend on whether the state court first undertook a harmless-error inquiry. Imposition of any more exacting standard, such as that of *Chapman*, is unnecessary and would upset the state-federal habeas balance recognized by this Court in *Brecht* and confirmed by Congress in AEDPA.

A. The *Brecht* Harmless-Error Standard Is Well-Established As A Basic Rule Of Habeas Corpus

Following *Brecht*, this Court has repeatedly held that "the more lenient *Kotteakos* harmless-error standard, rather than the stricter *Chapman* standard, normally governs cases of habeas review of constitutional trial errors. . . ." *O'Neal* v. *McAninch*, 513 U.S. 432, 438 (1995); see also *Calderon* v. *Coleman*, 525 U.S. 141, 147 (1998) (per curiam) (recognizing, in habeas proceedings, that constitutional errors must prejudice petitioner under *Brecht* standard before relief can be granted); *California* v. *Roy*, 519 U.S. 2, 4-5 (1996) (per curiam) ("[A] federal court reviewing a state-court determination in a habeas corpus proceeding ordinarily should apply the [*Brecht*] harmless error standard. . . ."); *Kyles* v. *Whitley*, 514 U.S. 419, 436 (1995) ("[W]e held in *Brecht* that the standard of harmlessness generally to be applied in habeas cases is the *Kotteakos* formulation. . . ."); *United States* v. *Dominguez Benitez*, 542 U.S. 74, 81 n.7 (2004) (stating that "on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard."); *United States* v. *Vonn*,

535 U.S. 55, 63 (2002) (stating that *Brecht* is "the variant of harmless-error review applicable on collateral attack").

In accord with this Court's repeated pronouncements that the *Brecht* standard controls when a federal habeas court analyzes trial error for harmlessness, the vast majority of circuit courts to consider the issue have held that *Brecht* is to be applied in habeas cases, regardless of the standard of review applied to trial error by the state court. *Hassine* v. *Zimmerman*, 160 F.3d 941, 951 (3d Cir. 1998); *Sherman* v. *Smith*, 89 F.3d 1134, 1141 (4th Cir. 1996); *Hogue* v. *Johnson*, 131 F.3d 466, 499 (5th Cir. 1997); *Gilliam* v. *Mitchell*, 179 F.3d 990, 995 (6th Cir. 1999); *Tyson* v. *Trigg*, 50 F.3d 436, 446-47 (7th Cir. 1995); *Bains* v. *Cambra*, 204 F.3d at 977; *Castro* v. *Oklahoma*, 71 F.3d 1502, 1515-16 & n.14 (10th Cir. 1995); *Horsley* v. *Alabama*, 45 F.3d 1486, 1492 n.11 (11th Cir. 1995); contra, *Starr* v. *Lockhart*, 23 F.3d 1280, 1292 (8th Cir. 1994); see also *Benn* v. *Greiner*, 402 F.3d 100, 105 (2d Cir. 2005) (reserving issue).

B. The Deferential *Brecht* Standard Is Well-Suited For Use On Collateral Review

The justification for applying a less stringent harmless-error standard in federal habeas proceedings than on direct appeal is rooted in the distinctly circumscribed and limited nature of federal habeas review. Collateral proceedings in the federal courts do not represent a continuation of direct review of criminal judgments. Federal habeas review is "secondary and limited." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983). It "has historically been regarded as an extraordinary remedy . . . ." *Brecht*, 507 U.S. at 633. "Habeas corpus 'is designed to guard against extreme malfunctions in the

state criminal justice systems.'" *Id.* (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)). "'[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Brecht*, 507 U.S. at 634 (quoting *United States* v. *Frady*, 456 U.S. 152, 165 (1982)).

In keeping with both the limited nature of federal habeas review and the fact that the writ typically is sought to overturn a final judgment already obtained by competent authorities after a presumptively fair trial, this Court has "never defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson*, 477 U.S. 436, 447 (1986). Rather, this Court has repeatedly emphasized the importance of deference to the States' "sovereignty over criminal matters" and to the finality of criminal judgments. *Brecht*, 507 U.S. at 637.

This concern is not limited to the issue of harmless error. It permeates this Court's jurisprudence regarding the scope and purpose of the writ. The plurality opinion in *Teague* v. *Lane*, 489 U.S. 288, 309 (1989), for example, restricted the ability of habeas petitioners to invoke new constitutional rules on collateral review, in part because the "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."

Likewise, in *Wright* v. *West*, 505 U.S. 277 (1992), the Court stressed the "significant costs" of habeas review. *Id.* at 293 (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982)). "Among other things, it disturbs the State's significant

interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Wright,* 505 U.S. at 293 (internal quotations omitted). The same considerations were articulated in *Stone* v. *Powell*, 428 U.S. 465 (1976), where the Court perceived that any benefit from reexamining Fourth Amendment claims of aggrieved prisoners via collateral review was "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Id.* at 494.

C. *Brecht* Is Not Limited To Cases In Which The State Court Conducted *Chapman* Harmless-Error Review

Petitioner acknowledges that *Brecht* is a less stringent harmless-error standard on collateral review than *Chapman*. Petitioner's Brief on the Merits (PBM) 21. He contends, however, that *Brecht* is limited to cases where the state court recognized federal constitutional error and then "correctly applied" the *Chapman* harmless error test. PBM 17. He refers to the prior application of *Chapman* by the state court in *Brecht*, PBM 21, and to this Court's observations in that case that "state courts are fully qualified" to identify constitutional error and undertake harmless-error review under *Chapman* on direct review and that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that *Chapman* requires state courts to engage in on direct review," PBM 25 (quoting *Brecht*, 507 U.S. at 636). Petitioner maintains that *Brecht* thus was "premised on the notion that state reviewing courts can be relied upon to identify federal constitutional error

under *Chapman*," so it ought not control where the state court did not apply *Chapman*. PBM 15.

1. Petitioner fundamentally misunderstands *Brecht*. The issue presented in *Brecht* was "whether the *Chapman* harmless-error standard applies in determining whether the prosecution's use for impeachment purposes of petitioner's post-*Miranda* silence, in violation of due process under *Doyle* v. *Ohio*, [426 U.S. 610 (1976)] entitles petitioner to habeas corpus relief." 507 U.S. at 622-23 (footnote and citation omitted). The answer given by the Court to that question was a straightforward no—not that the answer depended upon the state court having invoked the *Chapman* standard.

Brecht explained that "habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht*, 507 U.S. at 637 (quoting *United States* v. *Lane*, 474 U.S. 438, 449 (1986)). That *Brecht* answered globally the question of *Chapman*'s application on habeas review without regard to the resolution of the federal claim during the state court proceedings is apparent from *Brecht*'s textual holding: "[T]he *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." *Id.* at 638. One reason expressed for the selection of the standard was that it was "better tailored to the nature and purpose of collateral review and more likely to promote the considerations underlying our recent habeas cases." *Id.* at 637-38. It would be inappropriate to read an exception into *Brecht* where none is stated, especially where the choice of the standard was linked to the purposes of collateral review.

The central theme of *Brecht*, moreover, is maintenance of the proper balance between a state's interest in the finality of its criminal convictions and the federal interest in validating a defendant's constitutional rights. This Court spoke of the "costs" of applying *Chapman* on collateral review and the "imbalance" created by applying such a high standard to final and presumptively correct convictions. *Brecht*, 507 U.S. at 636-37. It expressly recognized that States should not have final convictions overturned on federal habeas simply "because the State cannot prove that an error is harmless under *Chapman*." *Id.* at 637. That clearly demonstrates that this Court's focus was on the appropriate role of collateral review, not on the procedural history of the case, such as the harmless-error standard used below, or whether trial error had been identified on direct review.

Brecht identified four considerations justifying the application of a relaxed harmless error standard on collateral habeas review: (1) the States' interests in the finality of convictions, (2) comity, (3) federalism, and (4) the recognition that "liberal allowance of the writ degrades the prominence of the trial itself." *Id.* at 635 (quoting *Engle* v. *Isaac*, 456 U.S. at 127). All of these considerations are implicated in every habeas corpus case, not just in cases where the state court undertook a *Chapman* analysis. As this Court explained:

> Overturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters. Moreover, granting habeas relief merely because there is a reasonable possibility that trial error contributed

> to the verdict, is at odds with the historic meaning of habeas corpus—to afford relief to those whom society has grievously wronged. Retrying defendants whose convictions are set aside also imposes significant social costs, including the expenditure of additional time and resources for all the parties involved, the erosion of memory and dispersion of witnesses that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of society's interest in the prompt administration of justice.

507 U.S. at 637 (citations and internal quotations omitted).

This comprehensive analysis led the Court to conclude that "[t]he imbalance of the costs and benefits of applying the *Chapman* harmless error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Brecht*, 507 U.S. at 636-37. These justifications for the holding in *Brecht* are logically not dependent upon the state courts having applied *Chapman* to conduct harmless-error review.

2. More recently, this Court indicated that *Brecht* applies where, as here, the state court did not recognize or declare a federal constitutional error. In *Penry* v. *Johnson*, 532 U.S. 782 (2001), a habeas applicant convicted of capital murder in state court asserted that evidence was admitted at trial in violation of his Fifth Amendment privilege against self-incrimination. The state courts determined that no constitutional error occurred and conducted no analysis for harmlessness. *Id.* at 791. This Court also found no constitutional error. But it alternatively held:

> Even if our precedent were to establish squarely that the prosecution's use of the Peebles report violated Penry's Fifth Amendment privilege against self-incrimination, that error would justify overturning Penry's sentence only if Penry could establish that the error "had substantial and injurious effect or influence in determining the jury's verdict."

Id. at 795 (quoting *Brecht,* 507 U.S. at 637). Similarly, in *O'Neal* v. *McAninch*, 513 U.S. 432, the state court on direct review had found no error in the instructions given on conspiracy and conducted no harmless error review. *State* v. *O'Neal*, No. 44551, 1985 Ohio App. LEXIS 6819, 1985 WL 8571 (Ohio App. 8 Dist. July 25, 1985) (unreported). Yet this Court reaffirmed *Brecht* as the appropriate standard of harmless error on collateral review of the state judgment. *O'Neal*, at 435-36.

3. Petitioner also errs in contending that a criminal defendant should not be deprived of what he calls the "right" to have the prejudicial effect of a constitutional error assessed under the *Chapman* standard "solely because a state appellate court failed to identify the constitutional defect in trial proceedings." PBM 24. He suggests that applying *Brecht* on collateral review deprives a defendant in that circumstance of ever having *Chapman* review of his claim. Not so. A defendant is free to pursue direct review of his final state conviction to this Court by writ of certiorari. 28 U.S.C. § 1257(a). See *Stone* v. *Powell*, 428 U.S. 465, 495 n.38 (noting that a defendant is "free to file a timely petition for certiorari prior to seeking federal habeas corpus relief"). If this Court on such review were to find constitutional error of the trial type, the *Chapman* standard would then apply. *Chapman* itself was a case which came to the Court on direct, not

habeas, review. 386 U.S. at 20. If petitioner wanted to ensure *Chapman* review, he should have availed himself of his opportunity to file a petition for writ of certiorari following the denial of his petition for review by the California Supreme Court. But he did not do so.

Petitioner unpersuasively suggests that limiting *Brecht* to cases where *Chapman* review has already occurred in state court "is preferable as a matter of policy and workability." PBM 25. But petitioner's view of the policy question is trumped, as explained above, by this Court's contrary view in *Brecht*. And there is no reason to conclude that it would be more "workable" to create such differing approaches to federal habeas corpus review of state cases, depending on whether or not the state court conducted *Chapman* review. To the contrary, a rule establishing, once and for all, that *Chapman* is not the standard for harmless-error review on federal habeas corpus review would clearly promote consistency. See *O'Neal* v. *McAninch*, 513 U.S. at 443 ("In a highly technical area such as this one, consistency brings with it simplicity. . . .").

4. Petitioner's proposed rule, with its emphasis on examining whether the state "correctly applied" the *Chapman* standard (PBM 17), also is unwieldy. Because he links the choice of harmless-error standards on collateral review to this concept of "correctness" in state court, petitioner requires a federal court performing collateral review to parse the state court's analysis before it knows what standard to apply. And his rule may even require a court to research possible variations in a state's harmless error rule depending upon the type of proceeding, or the petitioner's failure to follow state procedural law, in an attempt to divine whether the state expressed sufficient

fidelity to *Chapman*.[4] Given the stakes, even a citation to *Chapman* itself might not forestall claims by habeas applicants of pretextual or inadequate applications of that standard by the state appeals court. Requiring the district courts to countenance such "correctness" claims in habeas cases would be an impractical and unseemly method of conducting collateral review. In effect, the federal district courts would be grading appellate opinions of the states before discovering which harmless-error standard to employ, an act at odds with AEDPA. See *Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (AEDPA's "highly deferential" standard for evaluating state court rulings "demands that state-court decisions be given the benefit of the doubt.")

Adopting petitioner's rule would reintroduce the *Chapman* standard as the most common standard to be applied on collateral review, making *Brecht* a virtual nullity. Petitioner implies that a case like this one, where no *Chapman* review was performed in state court, is a rarity that must be accorded an exception to application of the *Brecht* rule. But the unusual case is, instead, the one where the state court has reached the error and applied *Chapman*. *Tyson* v. *Trigg*, 50 F.3d at 446 (a harmless error analysis in state court is a "fluke," as "ordinarily . . . the state court will not have found any error and therefore will have had no occasion to apply any standard of harmless

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[4] In state habeas cases, states might well choose to apply their own harmless error standards, which might not be as exacting as *Chapman*, in the course of rejecting a petitioner's federal constitutional claims on collateral review. In view of the policies articulated in *Brecht*, which establish the utility of the *Kotteakos* standard in reviewing a final state judgment, it would naturally be appropriate to apply the *Brecht* standard to those claims on § 2254 review too.

error"); see also *Sherman* v. *Smith*, 89 F.3d at 1141 ("In many habeas cases, a state court will have rejected the petitioner's claim of error, and thus will have had no opportunity to apply harmless error analysis."). Consequently, any rule requiring *Chapman* to be used when the state courts fail to address harmless error would render *Brecht* inapplicable in the majority of habeas cases and "rob [*Brecht*] of any general significance." *Tyson*, 50 F.3d at 446.

5. Petitioner's suggestion that *Brecht* is limited to cases where *Chapman* has been previously applied in state court is further undercut by the use of *Brecht* on collateral review of federal decisions. At least five circuits have held that *Brecht* is the appropriate standard for harmless-error analysis in § 2255 cases, even where no *Chapman* review has been undertaken. See *Ellis* v. *United States*, 313 F.3d 636, 644 n.4 (1st Cir. 2002) (rejecting *Starr* v. *Lockhart*, 23 F.3d 1280 as "contrary both to circuit precedent and to the overwhelming weight of authority elsewhere"); *United States* v. *Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006) ("[M]any of the concerns that motivated *Brecht* also are applicable in § 2255 cases."); *United States* v. *Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003) ("*Brecht*'s harmless error standard applies to habeas cases under section 2255. . . ."); *Ross* v. *United States*, 289 F.3d 677, 682 (11th Cir. 2002) ("[A]pplication of the *Brecht* standard to *Richardson* error on collateral appeal is the appropriate approach."); *Murr* v. *United States*, 200 F.3d 895, 906 (6th Cir. 2000) ("[F]or purposes of federal habeas corpus review, a constitutional error that implicates trial procedures shall be considered harmless unless it had a 'substantial and injurious effect or influence in determining the jury's verdict'") (quoting *Brecht*, 507 U.S. at 637). The Second

Circuit has suggested the same conclusion, albeit in dicta. See *Santana-Madera* v. *United States*, 260 F.3d 133, 140 (2d Cir. 2001).

These views are consistent with this Court's analysis of harmless error in *Brecht*. Although *Brecht* was a § 2254 case, this Court has not limited that standard to cases arising from state courts. In *United States* v. *Vonn*, 535 U.S. at 63, the Court assumed that the *Brecht* standard applies in all collateral proceedings, including § 2255 proceedings. As the Ninth Circuit has explained, although principles of comity and federalism present when reviewing state convictions are not implicated by § 2255 proceedings, the concerns that motivate *Brecht* are applicable on *all* collateral review, including review of federal convictions:

> [*Brecht*] is, more than anything else, motivated by "considerations underlying our habeas jurisprudence," that apply equally to collateral attacks on both federal and state convictions—considerations such as the different purposes of direct and collateral review and the importance of finality in criminal convictions. Our reading of *Brecht* is fortified by the case's citation to *Teague*'s anti-retroactivity principle to illustrate the general practice of "appl[ying] different standards on habeas than [those] on direct review."

United States v. *Montalvo*, 331 F.3d at 1057-58 (citations omitted and brackets in original).

The fact that *Brecht* is applied by the circuit courts to federal convictions where no *Chapman* analysis has preceded it demonstrates the force of just one of the central themes in *Brecht*: that collateral review plays a

limited role in comparison to direct review. Given the additional federalism and state sovereignty issues implicated when final state convictions are reviewed, the argument against ever applying *Chapman* in § 2254 cases becomes even stronger. It would be anomalous for the federal courts to accord less protection to a final conviction from state courts than they accord to a federal conviction. See *Francis* v. *Henderson*, 425 U.S. 536, 541 (1976) (considerations of comity and federalism require that state convictions on review under § 2254 be treated as deferentially as federal convictions on review under § 2255).

D. In Further Limiting And Not Expanding Habeas Review, AEDPA Supports A Forgiving Harmless-Error Rule

The policies that form the base for AEDPA support the use of a less demanding harmless-error standard like *Brecht*. Petitioner suggests that the provisions of AEDPA support the application of the *Chapman* standard on collateral review where there has been no state court *Chapman* analysis. He maintains that it would be "irrational[]" to apply *Brecht* in the absence of a *Chapman* analysis because the state court decision would be "contrary to" the *Chapman* decision, in violation of § 2254(d) of AEDPA. PBM 27. In such a case, petitioner contends, the federal court would be required "to give the prisoner the benefit of a harmlessness review under the *Chapman* standard." PBM 27. This logic does not hold.

As already noted, a substantial number of federal habeas cases involve no previous harmless-error analysis by state courts. Taken to its logical conclusion, petitioner's argument would result in a sharp reduction in the application of the *Kotteakos* standard, as called for by

Brecht, and a wholesale return to the *Chapman* standard. There is no reason to believe that such a result was intended by Congress. One will look in vain for any change in the law effectuated by the habeas reform provisions of AEDPA that enhance rather than contract the availability of relief for a state prisoner. The reforms work only in one direction: to reduce the availability of the writ. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners."); see also *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (AEDPA imposed "a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus").

Congress presumably was aware of *Brecht* when it enacted AEDPA, yet nothing in the text or the legislative history of AEDPA alludes to an alteration in the federal harmless-error doctrine in relation to state court decisions that are silent about harmless error, or to decisions, such as in the instant case, that reflect a state court's resolution of the claim on state law grounds. J.A. 97. As amended by AEDPA, 28 U.S.C. § 2254(d) mandates that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim" is either "contrary to" or an "unreasonable application of" clearly established federal law, as defined by the Supreme Court, or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." AEDPA does not *require* or even allow federal habeas courts to grant relief to a petitioner just because he succeeds in overcoming § 2254(d)'s threshold impediment to relief. Nor may the statute be read to preclude federal courts from

examination and review of state judgments under standards of review established by this Court, such as *Brecht* itself, when those standards are consistent with the language and purpose of AEDPA.[5]

Respondent's position is consistent with this Court's holding in *Mitchell* v. *Esparza*, 540 U.S. 12 (2003) (per curiam). In *Mitchell*, this Court considered the Sixth Circuit's decision that the state court's failure to instruct on an element of a capital offense had amounted to structural constitutional error, not susceptible to harmless-error review. Applying the deferential-review provisions of § 2254(d)(1), this Court reversed. First, the Court explained, it was not "contrary to" Supreme Court precedent to subject the petitioner's claim to harmless-error review. The AEDPA question then became, in this

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[5] Petitioner's reliance on *Eddleman* v. *McGee*, 471 F.3d 576 (6th Cir. 2006), PBM 27 n.19, is curious. First, *Eddleman* expressly recognizes that an application of *Brecht* is appropriate on collateral review where the state court has not conducted harmless error analysis: "[A]s we frequently have noted and the Supreme Court has confirmed, the *Brecht* standard continues to apply when federal courts must make a harmless-error determination in the first instance, as when a state court found no error and therefore did not address whether an error would be harmless." *Id.* at 583 n.3. Accordingly, *Eddleman* expressly contradicts petitioner's position in this case. Second, *Eddleman*'s approach to AEDPA jurisprudence is incorrect. *Eddleman* asserted that in cases where the state court has found harmless error, the state is entitled to less deference than when it has not found error at all. *Id.* at 584. It then posited that the deference standard of AEDPA protects a smaller "set of errors" in state trials than would be protected under *Brecht* review, and is "less deferential to the state court than the *Brecht* standard." *Id.* at 583 n.2. This conclusion cannot be correct. As this Court has stated, the effect of AEDPA was "to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell* v. *Cone*, 535 U.S. 685, 693 (2002). A reading of AEDPA that is "less deferential" to the state courts is contrary to the basic tenets of AEDPA.

Court's words, whether the state court had "applied harmless-error review in an 'objectively unreasonable' manner." 540 U.S. at 18. Concluding under the circumstances that the state court's harmless-error ruling was "hardly objectively unreasonable," this Court explained that "we may not set aside its decision on habeas review." *Id.*

Because it rejected the Sixth Circuit's holding that the state court had improperly engaged in harmless-error analysis, and also found that there had been no "objectively unreasonable" application of the *Chapman* harmless-error formulation, it was neither necessary nor prudent for the Court to reach the *Brecht* question. Presumably, had the Court found an unreasonable application of *Chapman* under § 2254(d)(1), it would not have affirmed the issuance of the writ unless the record demonstrated both a violation of the Constitution and prejudice under the *Brecht* standard. See *Penry* v. *Johnson*, 532 U.S. at 791 (indicating that if state court's action was contrary to or an unreasonable application of clearly established Supreme Court law, writ relief is possible "only" if *Brecht* standard is satisfied); *Early* v. *Packer*, 537 U.S. 3, 10-11 (2003) (per curiam) (inquiry into prejudice under *Brecht* "proper" if state court's ruling was "contrary to" clearly established Supreme Court law); see also *Calderon* v. *Coleman*, 525 U.S. at 147 (recognizing, in habeas proceedings, that constitutional errors must prejudice petitioner under *Brecht* standard before relief can be granted). Certainly, given the defining purpose of AEDPA's habeas corpus reforms, § 2254(d) did not free up the writ from *Brecht*'s strictures to make it more available now than it was before.

The principles embodied in AEDPA are fully consistent with *Brecht*'s harmless-error standard and its justification for that standard. The themes that pervade *Brecht*—respect for the sovereign States' interests in the integrity of their own judicial processes and the finality of convictions that have survived direct review within the state court systems—are echoed in AEDPA. That legislation was enacted, in large part, to ensure comity, finality, and deference to state court judgments by limiting the scope of collateral review and raising the standard for federal habeas relief. See 28 U.S.C. § 2254(d)(1)-(2); *Calderon* v. *Thompson*, 523 U.S. 538, 554-55 (1998) (discussing judicial limits on habeas relief guiding discretion consistent with the objects of AEDPA); *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000) ("AEDPA's purpose [was] to further the principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines."). Application of the *Brecht* standard to state court judgments parallels this congressional intent.

II.

PETITIONER WAS NOT PREJUDICED BY THE EXCLUSION OF MAPLES'S TESTIMONY

Because the *Brecht* standard should be applied to determine prejudice before petitioner may obtain relief in this case, the question remains whether the exclusion of Maples's testimony had a "substantial and injurious effect or influence in determining the jury's verdict."[6] Petitioner

[6] Given the strength of the case against petitioner, respondent has demonstrated that the exclusion of Maples's testimony was also harmless beyond a reasonable doubt. Respondent concedes, as it did in district court, that once a deprivation of constitutional rights has been

(Continued on following page)

maintains that it did, but he fails to fully credit the case against him. All courts that have reviewed this matter have found that the exclusion of Maples's testimony did not prejudice petitioner. "Prejudice" requiring correction by the writ of habeas corpus does not appear.

A. The Case Against Petitioner Was Substantial

The prosecution presented a very strong case of petitioner's guilt. Victim Cynthia Bell had broken into petitioner's home only days before the murder. Petitioner had threatened to kill her. He had been behaving erratically in the days leading up to the murder, kicking in a door and firing his gun out the window of his truck while threatening his passenger. On the night of the killings, he returned home spotted with blood. He carried the murder weapon, which was bloody and contained four spent shells. He told his brother, his friend and his housemate that he had shot and killed the victims, and described the specifics of the shooting in graphic detail. He confessed again to a former co-worker. He led police on a high-speed chase when an arrest was attempted, demonstrating consciousness of guilt.

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shown, the ultimate burden of persuasion is on the State. See *O'Neal* v. *McAninch*, 513 U.S. at 438-39 (the state bears "the risk of doubt"); see also *United States* v. *Dominguez Benitez*, 542 U.S. at 82 n.7 ("When the Government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard.") Given respondent's concession throughout the litigation, there is no reason to believe that the district court improperly allocated the burden in the proceedings below. Nor, in any event, is there any indication that the Ninth Circuit did so. The panel opinion does not allude to burden and circuit law binding on the panel had made it clear that the ultimate burden of persuasion rested on the State.

Significantly—and unlike the prior trials which ended in hung juries—petitioner's gun, the circumstances of its concealment and discovery, and the ballistics evidence linking it to the murders were introduced at the third trial under review here. In addition, petitioner admitted giving his brother's name and address to Jacobitz, lending credence to Jacobitz's testimony that petitioner had confessed to him and had asked him to intimidate his brother into changing his damning testimony.

B. Maples's Testimony Lacked Probative Value

In his brief, petitioner suggests that Hurtz was "the actual killer" and that the jury would have found petitioner not guilty had Maples been permitted to testify. PBM 35. At trial, however, the defense painted a different picture. Petitioner presented a "reasonable doubt" defense with three components: an alibi for the time of death; attacks on the credibility of the prosecution witnesses; and evidence of third-party culpability. J.A. 70. As to third-party culpability, petitioner suggested that *either* Borelli, Bernal, *or* Hurtz killed the Bells.[7] The force of this defense was diminished by the inherent contradiction created by targeting multiple candidates as the "actual killer."

Contrary to petitioner's assertion, Maples did not offer credible and reliable evidence of petitioner's innocence. The central thesis of a third-party confession establishing innocence is that, if the third party committed the killing,

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[7] The prosecutor pointed out the weakness of this approach in closing argument: "[I]n terms of the actual perpetration, Mr. Borelli did it, Mr. Hurtz did it, Mr. Bernal . . . did it. Take your pick. It's a shotgun approach." R. 5101.

then the defendant did not. In order for this logic to hold, the statement by the third party must (1) take credit for the killing at issue, not some other killing, and (2) be made in circumstances that suggest reliability. See *Chambers* v. *Mississippi*, 410 U.S. at 300. Both of these factors are missing here.

Petitioner's assertion that Maples "heard Mr. Hurtz confess to committing the crime for which Mr. Fry is now imprisoned," PBM 32, is inaccurate. Maples never testified that Hurtz said that he killed the Bells, nor did Maples identify the location or time of the killings. At most, Maples testified that she heard her cousin confess to shooting a man and a woman in a parking place. But even that conclusion is exceedingly questionable. It is not at all clear Maples testified to any "confession," let alone a confession worthy of credit by the jury. Maples was unable to say even whether she thought Hurtz was "serious" when she overheard him. J.A.10-11. She did not hear how the conversation started or ended. She only heard "bits and pieces" and was walking in and out of the room. J.A. 9-10. To have probative value, a third-party confession must be serious and concern the charged crime. Statements, which for all that appears might amount to jokes or storytelling, would receive no credence from the jury. There was little, if any, assurance the statements of Hurtz recounted by Maples surmounted even that minimal test.[8]

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[8] It was due to these fundamental defects in Maples's testimony that respondent argued in the courts below, and continues to assert, that the trial court did not err by excluding her testimony. See *People* v. *Hall*, 41 Cal. 3d 826, 833, 718 P.2d 99, 104, 226 Cal. Rptr. 112, 116 (1986) ("[T]here must be direct or circumstantial evidence linking the

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C. Petitioner's Other Arguments Are Unpersuasive

1. Petitioner concedes that he was permitted to present extensive evidence implicating Hurtz. In total, seven other witnesses at trial testified about Hurtz's confessions and incriminating admissions. J.A. 179 (Chantelle Eittreim, Candida Eittreim, David Eittreim, Kenneth Keith, Harmina Ross, Eliane West, and George McCleese). Recognizing that impeachment and bias problems infected the testimony of all of these witnesses, petitioner contends that Maples was essentially the only third-party culpability witness who could survive a jury credibility assessment, since she was his cousin with no apparent bias.

But bias was only one problem the seven other witnesses faced. As noted by the state court, a second problem faced by those witnesses was their "failure to give timely, truthful information to the police." J.A. 73. And Maples would have been impeached for the same reason: the conversation she overheard occurred in April of 1994, but she did not call the police and report the "confession" or otherwise come forward until contacted by the defense midway through the third trial. J.A. 18. Moreover, Maples would have been severely discredited on cross-examination because she conceded that she heard only "bits and pieces" of what Hurtz said, was not present when he started and finished talking, and was unclear on the context of what

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third person to the actual perpetration of the crime."); see also Respondent's Opposition to Writ of Certiorari, at 6 ("relevant evidence can be curtailed" without violating the Constitution when its probative value is weighed against "confusion of the issues, or potential to mislead the jury" by a state statute, such as California Evidence Code § 352) (citations omitted).

he was saying. Given these weaknesses, Maples was no more credible than the defense witnesses who did testify. The jury rejected the testimony of the seven witnesses who stated without qualification that Hurtz admitted to the crime; the testimony of one more witness who could not offer such unqualified evidence could not have affected the jury's evaluation of the case.

Petitioner's defense suffered heavy blows, but the exclusion of Maples's testimony was not one of them. The third-party culpability defense was greatly weakened by his dragooning three other potential killers before the jury, and by his failure to make any credible case that he was exculpated if the others, or some subset of them, were involved. The attacks on the prosecution witnesses were rejected by the jury. As to the asserted alibi, petitioner focused on the testimony of truck driver Russell Carter, who claimed to witness the killings at 6:50 a.m. Because the bodies had already been discovered and 911 called by that time, Carter's testimony "was unbelievable and contrary to all the other evidence in the case." J.A. 72. Maples's testimony would have amounted to a mere sideshow in the context of the overall defense such as it was.

2. Petitioner's idea that, if someone else confessed he then must be innocent, does not survive close examination. The assertion by the defense of multiple confessions to these murders by assorted people, none of whom were otherwise connected to the offense by physical evidence, bespeaks a lack of reliability of all those confessions.[9]

[9] Defense witness McCleese conceded that it was "not uncommon" for criminals to claim involvement in crimes to "look big" and gain status in the jail environment. R. 4475-76. McCleese said Hurtz had a

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The state court characterized the "evidence of the purported third party culpability of Borelli, Hurtz and Bernal" as "both contradictory and weak." J.A. 73. The "supposed 'confessions' were themselves ambiguous and self-contradictory." J.A. 73. Petitioner fails to consider the most likely explanation for these third-party statements: that they represented bragging and puffing. It is hardly surprising that a drug dealer might claim false credit for drug murders to enhance his reputation, especially if another man was being prosecuted for the crime.

3. Petitioner's focus on the prior hung juries and on the length of deliberations is faulty. The discovery of petitioner's gun was the pivotal moment in the case. Even petitioner's defense counsel immediately conceded this, acknowledging that discovery of the weapon and its subsequent testing was "certainly . . . going to make a lot of difference in this case . . . " R. 2404. In addition, petitioner partially corroborated his jailhouse confession by acknowledging that he gave his brother's name and address to Jacobitz. R. 3743-44. The jury's requests to rehear testimony by the ballistics expert (R. 5167-68) and by Jacobitz (R. 5247) show the newly discovered evidence was of great significance. Its absence from the first two trials renders irrelevant the earlier jury deadlocks.

Petitioner's emphasis on the length of jury deliberations is also misplaced. This was an eleven-week trial involving testimony from more than 100 witnesses. R. 4995, 5005. Deliberations began on May 4, 1995, and the jury returned its verdicts on June 8, 1995. R. 5060, 5337. The jury deliberated for 24 court days, with deliberations

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reputation as a "loud talker," and McCleese did not believe Hurtz when he claimed involvement in the killings of the Bells. R. 4474-75.

cut short on two of those days due to illness (R. 5133) and to accommodate a juror's appointment, (R. 5166). The trial court characterized the jury as "conscientious" and defense counsel agreed. R. 5315. There were twenty-four requests by the jury for readbacks of testimony. Nearly every day of deliberations included readbacks. In context, the length of deliberations was not extraordinary.

The excluded testimony of Maples was not of a nature and quality that would have altered the outcome of this case.

CONCLUSION

Respondent respectfully requests that the judgment be affirmed.

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Respectfully submitted,

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